

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition

of

**ANTON'S CAR CARE CENTER, LTD.**

for Revision of a Determination or for Refund  
of Sales and Use Taxes under Articles 28 and 29  
of the Tax Law for the Period December 1, 1978  
through November 30, 1982.

DECISION  
DTA NOS. 800529/801466/  
802198

---

In the Matter of the Petition

of

**ANTON PARISI,  
OFFICER OF ANTON'S CAR CARE CENTER, LTD.**

for Revision of a Determination or for Refund  
of Sales and Use Taxes under Articles 28 and 29  
of the Tax Law for the Period December 1, 1978  
through November 30, 1982.

---

Petitioner Anton's Car Care Center, Ltd., 345 Sunrise Highway, Rockville Centre, New York 11570, filed an exception to the determination of the Administrative Law Judge issued on January 22, 1988 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through November 30, 1982 (File Nos. 800529, 801466 and 802198).

Petitioner Anton Parisi, officer of Anton's Car Care Center, Ltd., 4080 Briarwood Avenue, Seaford, New York 11783, filed an exception to the determination of the Administrative Law Judge issued on January 22, 1988 with respect to his petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through November 30, 1982 (File Nos. 800841, 801467 and 802199).

Petitioners appeared by Kestenbaum & Mark, Esqs. (Richard S. Kestenbaum, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Neither of the parties submitted a brief on exception. Oral argument was heard on June 7, 1988 at the request of the petitioners.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

### ***ISSUES***

I. Whether the Division of Taxation's determination and assessment of additional sales tax against petitioner Anton's Car Care Center, Ltd., following an audit, was proper.

II. Whether imposition of a late payment penalty pursuant to Tax Law former section 1145(a)(1) is proper and should be sustained where the Division did not assert such penalty as an alternative to the fraud penalty until after the hearing on the fraud penalty.

### ***FINDINGS OF FACT***

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference except that we modify findings of fact "2", "8" and "12" as stated below.

Petitioner Anton Parisi is the owner and sole shareholder of petitioner Anton's Car Care Center, Ltd. ("the corporation"). The corporation operates a gasoline service station performing automobile repairs and selling gasoline and other petroleum products. The station has eight service bays and six gasoline pumps. During the period at issue, the station was open from 6:00 A.M. to 12:00 midnight Monday through Saturday, and from 8:00 A.M. to 12:00 midnight on Sunday, for selling gasoline. The station was open from 8:00 A.M. to 5:00 P.M., Monday through Friday, for performing repair services.

We modify finding of fact "2" to read as follows:

On or about October 20, 1981, the Division commenced an audit of the business operations of the corporation. The auditor requested all of the corporation's business records for the period of December 1, 1978 through August 31, 1981 including, specifically, its general ledger, cash receipts journal, cash disbursements journal, Federal income tax returns, daily sheets, and sales and purchase invoices. The auditor received a cash receipts journal and a cash disbursements journal and Federal income tax returns for two of the years at issue, and was advised that some records were lost and that other records were with the corporation's accountant. The auditor did not receive a general ledger, nor any daily sheets, nor a complete set of sales or purchase invoices. Based upon the records supplied, the auditor determined there were insufficient source documents available to perform a detailed audit, and thus decided to resort to indirect audit methodologies as a means of determining the accuracy of petitioners' taxable sales and sales tax liability as reported.

The auditor initially visited the corporation's premises on October 27, 1981. Thereafter, an observation of petitioners' business activities was conducted on the dates of May 12 and 13, 1982. The auditors involved observed the corporation's eight repair bays as being in full use, and also observed repairs taking place outside of the garage bays. In addition, the auditors noted a posted labor rate for mechanics of \$30.00 per hour on the dates of the observation.

Comparison of those records made available by petitioners, together with third party information furnished to the Division by Mobil Oil Corporation ("Mobil") detailing the corporation's purchases of gasoline and other petroleum products from Mobil, revealed large discrepancies. For example, when Federal income tax returns were compared to the corporation's sales tax returns, the income tax returns indicated sales for 1980 and 1981 of approximately \$400,000 per year greater than sales as per the corporation's sales tax returns. In addition, Mobil's verification of petitioners' gasoline purchases reflects purchases of \$1,928,000.00 for the period December 1, 1978 through August 31, 1981, whereas the corporation's sales tax returns reported taxable sales (gasoline and repairs) of only \$1,171,000.00.

The auditor recalculated petitioners' gasoline sales by taking the total gasoline purchases per Mobil's records for the period December 1978 through August 1981 and marking up such purchases based on the selling price of gasoline observed at the corporation's location during the auditor's

October 1981 visit.<sup>1</sup> This marked-up amount of gasoline sales, deemed audited taxable gasoline sales, totalled \$2,137,159.71 for the period December 1978 through August 1981. The auditor's markup was based upon the assumption that the price from Mobil to petitioner, per Mobil's records, was exclusive of excise and sales taxes.

In addition to gasoline sales, the auditor determined repair sales by estimating that 5 mechanics each worked a 40-hour week at \$25.00 per hour, with such \$25.00 per hour rate utilized as opposed to the \$30.00 per hour observed rate to allow for "down time". In addition, parts were estimated to be one-half of the labor rate, thus resulting in an equivalent of \$37.50 per hour of repair income (labor plus parts) times 40 hours per week times 5 mechanics. This resulted in \$1,072,500.00 of audited taxable repair sales for the period December 1, 1978 through August 31, 1981. Further, the auditor marked up petitioner's purchases of oil (per Mobil's information) at 100 percent of cost. Finally, the auditor estimated that petitioner provided "express lube" service (which provided an oil change and lubrication within 15 minutes without an appointment) to five customers per day. These two latter items (oil and express lube) resulted in audited taxable sales of \$93,313.65.

After computing audited taxable sales, the auditor reviewed those exempt sales records provided for the month of June 1982 (the only records pertaining to exempt sales made available) and allowed a 10 percent reduction for exempt sales. The auditor thereafter applied the tax rate to the audited total taxable sales and, after allowing credit for tax paid with the corporation's sales tax returns, determined the amount of tax underpaid and assessed the same for the period December 1, 1978 through August 31, 1981.

We modify finding of fact "8" to read as follows:

Subsequent to the above-described activities, the Division of  
Taxation expanded the audit period to cover the periods extending through

---

1

The markup was determined by comparing the October 1981 selling prices, as observed, with a purchase invoice for gasoline from December of 1981.

August 31, 1982. No additional field audit work was performed and no additional request for records was made to petitioners for the extended period. Rather, the Division applied the same error factors as were determined upon field audit to the additional audit period in calculating and assessing tax due.

As a result of the aforementioned audit activity, the Division issued to petitioner Anton's Car Care Center, Ltd. the following notices of determination and demand for payment of sales and use taxes due:

<u>Date Issued</u>	<u>Notice Number</u>	<u>Period</u>	<u>Tax Due<sup>2</sup></u>
3/18/83	S830310043N	12/1/78-8/31/80	\$93,440.12
9/20/83	S830906000N	9/1/80-5/31/81	36,542.81
6/20/84	S840613009N	6/1/81-8/31/81	11,057.33
11/14/84	S841114193C	9/1/81-11/30/82	59,265.39

Four additional such notices were issued to petitioner Anton Parisi, identical in all respects to those set forth about but for the notice number. These notices assessed Mr. Parisi as an officer responsible for the collection and remittance of taxes on behalf of petitioner Anton's Car Care Center, Ltd. Each of these notices included the assessment of interest, plus a fraud penalty equal to 50 percent of the tax assessed.

At hearing, petitioner Anton Parisi appeared and testified on behalf of petitioners, and submitted certain limited documentation including some records of the corporation for the period in question.

We modify finding of fact "12" to read as follows:

Among the records petitioners offered in evidence were several purchase invoices (delivery tickets) in support of the allegation that the price shown on the Mobil third party verification of the corporation's purchases included excise and sales taxes.<sup>3</sup> The invoices reflected, beneath the listing of price per gallon and quantity, the following format:

"Taxes when not included in prices shown above.

<sup>2</sup>

Exclusive of penalty (Tax Law { 1145[a][2]) and interest.

<sup>3</sup>

Petitioners note that such inclusion would remove much of the discrepancy found between the sales tax returns and the Federal income tax returns as to dollar amount of sales.

- Federal Gas &/or Fuel \_\_\_\_\_
- Federal Oil &/or Grease \_\_\_\_\_
- State Gas &/or Fuel \_\_\_\_\_
- Sales or Occupational \_\_\_\_\_%"

There were no amounts filled in on any of the above areas on the invoices with respect to taxes.

Mr. Parisi also provided summary records of the mechanics' work on a weekly basis. However, such records did not, in general or specifically, further break down the hours and types of repairs performed by the mechanics, but rather only listed a dollar amount of work performed.

At hearing, Mr. Parisi conceded that he was an officer responsible for the collection and remittance of taxes on behalf of the corporation during the period in issue.

In addition to the facts found by the Administrative Law Judge, we find the following facts.

The Division of Taxation did not seek to assert penalty pursuant to section 1145(a)(1) of the Tax Law as an alternative to the fraud penalty, in case fraud was not proved, until after the hearing was held and completed. The Division raised the section 1145(a)(1) penalty for the first time in a post hearing letter submitted to the Administrative Law Judge.

### ***OPINION***

The Administrative Law Judge determined that the books and records of the corporation were inadequate and that the Division of Taxation properly resorted to external indices to determine petitioners' tax liability. The Administrative Law Judge also concluded that petitioners did not sustain their burden in showing error in the audit method or amount assessed.

With respect to penalty, the Administrative Law Judge found that the Division had not met its burden of proving fraud, but that the Division could assert the section 1145(a)(1) penalty in the alternative to fraud and the Administrative Law Judge sustained the imposition of the section 1145(a)(1) penalty.

On exception petitioners challenge the Administrative Law Judge's conclusions of law asserting that sufficient records were available for the Division to perform a detailed audit and petitioners assert that they established reasonable cause to abate the section 1145(a)(1) penalty. The petitioners also disagree with certain of the Administrative Law Judge's findings of fact with respect

to the audit performed by the Division. The petitioners assert that: eight repair bays were not in full use during the observation test; the price of fuel stated on the computer printout from Mobil (the corporation's supplier) was inclusive of excise and sales taxes; the audit determination of repair sales was based on estimates; the audit allowance for exempt sales was too small and the corporation's business did change greatly from the initial audit period (12/1/78 through 8/31/81) to the extended period (9/1/81 through 8/31/82).

We modify the determination of the Administrative Law Judge.

With respect to the adequacy of the corporation's records, it is clear that the records provided were not adequate to support a detailed audit. Petitioners did not provide a general ledger, daily sheets or purchase invoices. Sales invoices were available only for a few months. The only records petitioners did provide were a cash receipts and cash disbursement journal and Federal income tax returns for two years. These records provided no source documents and no means to verify the accuracy of the returns as filed; therefore, the Division properly resorted to external indices to determine tax (S.H.B. Super Markets, Inc. v. Chu, 135 AD2d 1048). In such circumstances, the Division is required to select a method "reasonably calculated to reflect the taxes due" (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206) and the burden is on the petitioner to establish by clear and convincing evidence that the method and the amount of the assessment are erroneous (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 859).

We agree with the determination of the Administrative Law Judge that petitioners have not sustained this burden in showing error in the audit methodology for the initial audit period. Petitioners' challenge to the Division's estimate of repair sales and exempt sales is not based on documentary proof of actual sales, but instead on the argument that petitioners' estimates are better than the Division's. Such a challenge to the audit fails on the grounds that any imprecision in the audit methodology is the product of the corporation's inadequate record keeping and is not the product of arbitrary and capricious conduct on the Division's part (Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 944).

With respect to their claim that the Mobil computer printout price included Federal and State excise taxes, petitioners have introduced some delivery invoices with a price that does include Federal and State taxes. These delivery invoices do not necessarily establish, however, that the price shown on the Mobil printout also includes the Federal and State excise taxes. We conclude, therefore, that the petitioners have not sustained their burden of proof on this issue.

The last issue raised by petitioners relates to the extension of the audit results to cover the period from September 1, 1981 through August 31, 1982. The Administrative Law Judge sustained this extension on the basis that there was no evidence that petitioners changed the nature of the business operations or the method of record keeping. Since the Division did not request books and records for this extended period nor do any other field work, it is impossible to determine the sufficiency of petitioners' records for this period and the use of the test period was improper (Matter of King Crab Restaurant, Inc. v. Chu, 134 AD2d 51 [3d Dept 1987]). Therefore, the assessment for this period must be annulled (Matter of Adamides v. Chu, 134 AD2d 776, lv to appeal denied 71 NY2d 806).

The last issue is the Administrative Law Judge's imposition of penalty pursuant to former section 1145(a)(1) of the Tax Law. We held in Ilter Sener d/b/a Jimmy's Gas Station (Tax Appeals Tribunal, May 5, 1988) that the Division may assert the section 1145(a)(1) penalty in its answer as an alternative to the fraud penalty. We found in Sener that the assertion of the lesser penalty in the answer gave the petitioner adequate notice, prior to hearing, of the penalties at issue and thus was not in conflict with due process considerations. The same cannot be said for the penalty asserted here after the hearing. "The first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence but not charged." (Matter of Murray v. Murphy, 24 NY2d 150, 157 [citations omitted]). The Division's failure to raise the section 1145(a)(1) penalty until after the hearing deprived petitioners and their representative of the opportunity to prepare and present a defense to the lesser penalty. Prejudice in such a situation is presumed (Matter of Murray v. Murphy, supra, at 157). Accordingly, we conclude that the Division

did not properly assert the lesser penalty (see, Dajos v. Commissioner, T.C. Memo 1986-330) and the Administrative Law Judge improperly sustained it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Anton's Car Care Center, Ltd. and Anton Parisi are granted to the extent that the penalty imposed pursuant to section 1145(a)(1) of the Tax Law is cancelled and the notices of determination issued on November 14, 1984 for the period after September 1, 1981 are cancelled, but except as so granted are in all other respects denied;

2. The determination of the Administrative Law Judge is modified as indicated in paragraph "1" above but except as so modified is affirmed; and

3. The petitions of Anton's Car Care Center, Ltd. and Anton Parisi are granted to the extent indicated in paragraph "1" above and conclusion of law "G" of the the Administrative Law Judge's determination but except as so granted are denied and the notices of determination issued on March 18, 1983, September 20, 1983 and June 20, 1984 are sustained.

Dated: Albany, New York  
November 23, 1988

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner